

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

FRED HOLABIRD,

Plaintiff,

v.

DONALD KAGIN, et. al.,

Defendants.

3:14-cv-00262-HDM-CBC

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

Currently pending before the court is Plaintiff Fred Holabird's Motion for Evidentiary Hearing to Enforce Settlement Agreement, (ECF No. 197)<sup>1</sup>, and Defendant Donald Kagin's Cross-Motion to Enforce Settlement Agreement. (ECF 208). Following full briefing of these competing motions, the court held an evidentiary hearing on July 11 and 12, 2018 (ECF Nos. 210, 212). For the reasons set forth herein, the court recommends Plaintiff's Motion (ECF No. 197) be granted, and Defendant's Cross-Motion (ECF No. 208) be denied. The Court further recommends that judgment be entered in favor of Plaintiff, as stated in this report and recommendation.

**I. FACTUAL FINDINGS**

1. Plaintiffs Fred Holabird and Robin Holabird filed a Complaint against Donald H. Kagin, et al., in the Second Judicial District Court of the State of Nevada in and for Washoe County on April 15, 2014. (Transcript of Evidentiary Hearing, July 11-12, 2018,

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<sup>1</sup> This motion was granted, in part, by the Court's Minute Order setting an evidentiary hearing. (ECF No. 205). However, to the extent the motion sought the enforcement of the settlement agreement, this aspect of the motion remains outstanding.

1 p. 14, lines 1-5.)<sup>2</sup> On April 18, 2014, Plaintiff filed an Amended Complaint. The Amended  
 2 Complaint alleges, among other things: breach of contract, misrepresentation/fraud,  
 3 conversion, civil conspiracy, and racketeering arising out of the breakup and dissolution  
 4 of a company owned by Defendant Don Kagin and known as Holabird Kagin Americana  
 5 Inc. ("HK" or, sometimes, "HKA") and with which Plaintiff had been employed for in excess  
 6 of eight (8) years. (Amended Complaint.) (Plaintiffs and Defendants are generally referred  
 7 to herein as, the "Parties.")

8 2. The case was removed by Defendants to the United States District Court,  
 9 District of Nevada, Reno, on May 21, 2014. (ECF No. 1; T. p 15, lines 2-4.)

10 3. After removal to the United States District Court, the Parties litigated for  
 11 some two and one-half (2½) years, engaging in extensive motion practice and discovery,  
 12 including the production of thousands of documents, numerous depositions,  
 13 interrogatories, and the like. (T. p. 15, lines 5-15.)

14 4. On December 12 and 13, 2016, the Parties engaged in settlement  
 15 negotiations before Magistrate Judge Valerie P. Cooke. On December 13, 2016, the  
 16 Parties agreed to a settlement. (Plaintiff's Exhibit 1.)

17 5. On December 13, 2016, the Parties put the terms of the Settlement  
 18 Agreement on the record before Judge Cooke. (Plaintiff's Exhibit 1.)

19 6. On February 3, 2017, the Parties executed a written Settlement Agreement  
 20 ("SA"). (Plaintiff's Exhibit 2.) Following the execution of the SA, the court entered an order  
 21 granting the parties' stipulation for dismissal of this matter with prejudice. (ECF No. 186).  
 22 In this order, the court specifically ordered that "the settlement among the parties is a  
 23 reasonable compromise and that the United States District Court for the District of Nevada  
 24 shall retain jurisdiction over the parties to enforce the terms of the Settlement Agreement."  
 25 (*Id.*, p. 2).

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 28 <sup>2</sup> Citations to this Transcript will be noted as "T." only. All references to exhibits refer  
 to those exhibits that were submitted during the July evidentiary hearing.

1           7.     On March 14, 2018, Plaintiff filed a Motion to Enforce Settlement Agreement  
2 (ECF No. 187.) After Defendants filed their Opposition (ECF No. 190), this Court ordered  
3 the Parties to meet and confer in a good faith attempt to resolve their differences. (ECF  
4 No. 193.) Although the parties conducted this meet and confer, no resolution could be  
5 reached.

6           8.     On May 10, 2018, Plaintiff filed a second Motion for Evidentiary Hearing to  
7 Enforce Settlement Agreement. (ECF No. 197.) In this document, Plaintiff requested the  
8 Court hold Defendants in default of the SA and to enter a judgment accordingly.  
9 Defendant filed a response, (ECF No. 198), and Plaintiff replied. (ECF No. 199).

10          9.     Thereafter, Judge Cooke ordered a status conference to be held on June  
11 25, 2018. (ECF No. 202.) During the status conference, Plaintiff's Motion for Evidentiary  
12 Hearing was granted, to the extent it requested an evidentiary hearing. The hearing was  
13 set for July 11 and 12, 2018. (ECF No. 205). The Court further advised counsel that the  
14 Court does not normally retain jurisdiction over Settlement Agreements, but that the Court  
15 would make an exception in this case because the parties may have been confused as to  
16 that position and because the SA provided, in Section 6: "With the Court retaining  
17 jurisdiction to enforce this Agreement and resolve any disputes that may arise out of this  
18 Agreement."

19          10.    Also, on February 3, 2017, the same date the SA was executed, the parties  
20 executed a Stipulation and Confession of Judgment. (Defendants' Exhibit 1.) The  
21 Confession of Judgment anticipated the submission of declarations upon default and  
22 provided: "The Court may enter judgment in favor of Plaintiff and against Defendants for  
23 the outstanding amount owed under the financial terms set forth in Paragraph Nos. 1 and  
24 2 (SA Sections 8, 9, and 10) ..."

25          11.    The SA provides, in Section 8, that Defendants will pay Plaintiff \$100,000.00,  
26 with \$35,000.00 to be paid at the time of execution and delivery of the Agreement, and the  
27 balance of \$65,000.00 to be paid on or before April 30, 2017. Defendants complied with  
28 this part of the SA. (T. p. 22, lines 13-21.)

1           12. The SA provides, in Section 9.1, that Defendants will pay Plaintiff the sum of  
2 \$150,000.00 in twelve equal monthly installments of \$12,500.00 each, beginning one year  
3 from the date of the Agreement, which payments are subject to credits as set forth in  
4 Section 9.2. The first payment under this provision was due on February 3, 2018.

5           13. Pursuant to Section 9.2 of the SA, Defendants were to provide to HWAC  
6 (Plaintiff's Western Americana auction company) \$200,000.00 of Americana previously  
7 owned by HK and purchased by Plaintiff when he was an employee of HK, at the prices  
8 Plaintiff paid for the items while an employee of HK. (T. p. 24, lines 3-15.) Defendant  
9 Kagin originally argued that "Holabird Cost" also meant any item sold by HK at retail.  
10 (Kagin Declaration, ECF 191, at p. 8, ¶ 26), but later admitted under cross examination  
11 that "Holabird Cost" only included items sold by Holabird to HK when Defendant Kagin  
12 acquired Holabird's company and items purchased by Holabird on behalf of HK while  
13 employed by HK (T. p. 458, lines 2-17).

14           14. Section 9.2 of the SA does not provide a time by which Defendants must  
15 deliver the \$200,000.00 in Americana, although Plaintiff testified that it was his  
16 understanding that the material would be supplied immediately after execution of the SA.  
17 (T. p. 24, lines 17-22.) Defendant Kagin, who negotiated the SA, did not testify as to his  
18 expectations or understanding as to when the \$200,000.00 in Americana was to be  
19 delivered.

20           15. At the time of the evidentiary hearing, Plaintiff contended that Defendants  
21 still had not delivered \$200,000.00 in Americana previously owned by HK and purchased  
22 by Plaintiff while employed by HK, some seventeen (17) months after execution of the SA.  
23 (T. p. 24, lines 23-25.) Plaintiff testified that no more than \$60,000.00 had been received  
24 over the course of 2017 and 2018, through six (6) shipments spread over this time period,  
25 and probably less than \$60,000.00. (T. p. 25, lines 1-9; p. 29, lines 12 through p. 30, line  
26 8.) In fact, Plaintiff's calculations show a total of \$43,156.00 worth of the Americana  
27 received. (Plaintiff's Exhibit 5; T. p. 57, line 7 through p. 66, line 15.) Defendant Kagin  
28 testified that he believes he has sent at least \$150,000.00 worth of Americana previously

1 purchased by Plaintiff while employed by HK, and possibly \$200,000.00 worth at HK costs.  
2 (T. p. 412, lines 3-10).

3 16. Plaintiff testified that he went through the Kagin inventory highlighting, in  
4 different colors, items on the inventory that were: (1) not owned by HK but, rather, were  
5 owned by Don Kagin, his father, Dr. Awerbuch, or others; (2) items that had been  
6 overvalued by Defendants, stating retail rather than the wholesale prices paid by HK; (3)  
7 tokens that had been valued as if they had been "graded" by a professional grading  
8 company, when they had not, which added \$11.00 in value to each token otherwise valued  
9 at \$1.00; (4) material that had been dropped off that was not on either inventory or was  
10 valued at \$0.00 on the Kagin inventory; and (5) \$27,000.00 worth of mining books that  
11 were on the Kagin inventory but never received by Plaintiff. (Plaintiff's Exhibit 5; T. p. 30,  
12 line 9 through p. 34, line 3).

13 17. Defendant Kagin admits that some of the material was owned by himself or  
14 his father and that some of the material had been owned by Dr. Awerbuch and was not  
15 material that had been purchased by Plaintiff while he worked for HK or was priced at retail  
16 prices in the inventory. (Plaintiff's Exhibit 12; T. p. 456, lines 5-15; p. 459, line 5 through  
17 p. 463, line 21.)

18 18. Defendant Kagin admits that he has no proof that the tokens that he claims  
19 were graded were in fact graded, other than his recollection from seven years ago. (T. p.  
20 469, line 14 through p. 470, line 14.)

21 19. Plaintiff testified that he would not have had the tokens graded, even if they  
22 had been owned by HK when he worked for HK, because they were of such low value that  
23 no third-party grading company would have graded them (T. page 35, line 14 through p.  
24 41, line 10.)

25 20. Plaintiff also testified that none of these tokens were in the plastic boxes  
26 issued by the grading company certifying that they were graded, such as depicted in  
27 Plaintiff's Exhibit 29. (*Id.*)  
28

1           21. Defendants did not produce any evidence that the \$27,000.00 worth of  
2 mining books had ever been delivered to Plaintiff. (T. p. 470, line 14 through p. 471, line  
3 23.)

4           22. Section 9.2 of the SA also provides that HWAC (Plaintiff) will auction the  
5 \$200,000.00 in Americana in a reasonable manner and will retain from the auction  
6 proceeds a buyer's premium of 21% and will also retain 7.5% of the hammer price of each  
7 item. The remaining auction proceeds are to be applied in the following order: first to pay  
8 Plaintiff \$25,000.00 and second to pay Plaintiff the \$150,000.00 obligation set forth in  
9 Section 9.1, and to offset Defendants' obligation to pay the \$150,000.00 in installment  
10 payments of \$12,500.00 commencing one year from the date of the SA. Section 9.2  
11 further provides that Defendants will supply the material with an inventory. Later in Section  
12 9.2, it provides that Plaintiff will provide a report of "material sold, the venue and manner  
13 of sale, the prices realized, the proceeds paid to Mr. Holabird, and the proceeds credited  
14 against the \$150,000.00" identified in Section 9.1.

15           23. Plaintiff provided Defendants with the reports required by the SA within forty-  
16 five (45) days of each auction as further required by the SA. (T. p. 124, line 25 through p.  
17 125, line 2; Plaintiff's Exhibit 8 and 9). Those reports indicate the material sold, the venue  
18 and manner of sale, the prices realized, the proceeds paid to the Plaintiff and the proceeds  
19 credited against Defendants' \$150,000.00 obligation, as required by the SA. (T. p. 123,  
20 line 16 through p. 124, line 24.) These reports indicate that the first \$25,000.00 to be paid  
21 to Plaintiff from the proceeds of the auctions had not been completely paid down by  
22 February 3, 2018, one year from the date of the SA, and that \$9,598.75 was still owing on  
23 the first \$25,000.00. (Plaintiff's Exhibit 8, p. 1.) As of February 3, 2018, the reports indicate  
24 that none of the \$150,000.00 had been offset. (Plaintiff's Exhibit 8, p. 1). The reports  
25 indicate that it was not until after the March 18, 2018, auction that enough auction  
26 proceeds had been generated to offset any of the \$150,000.00. As of the time of the  
27 evidentiary hearing, the \$150,000.00 had been offset by only \$6,601.53, leaving a total  
28 owing of \$143,309.47 (Plaintiff's Exhibit 8, p. 1).

1           24. Plaintiff testified that Defendants failed to make the February 3, 2018,  
2 monthly payment of \$12,500.00 as provided in the SA and that Defendants had failed to  
3 make the payments every month thereafter up until late the Friday before the Evidentiary  
4 Hearing, when Plaintiff's counsel received a check from Defendants delivered by  
5 Defendants' counsel in the amount of \$70,150.15 purportedly for payments not made on  
6 February 3, 2018, March 3, 2018, April 3, 2018, May 3, 2018, and June 3, 2018. (T. p.  
7 22, line 22 through p. 23, line 17). Defendant Kagin does not deny that he failed to make  
8 the \$12,500.00 monthly payments, but testified that he did not make the payments  
9 because he thought Plaintiff's accounting was faulty, and he did not have a full accounting.  
10 (T. p. 492, line 16 through 493, lines 2-6.) Defendant Kagin admits sending the check for  
11 \$70,150.15 late on the Friday before the evidentiary hearing. (T. p. 492, line 16 through  
12 p. 493, line 15.) Yet he testifies that he sent the check for \$70,150.15 even though he still  
13 contends that he did not have a full accounting. (*Id.*).

14           25. Pursuant to the SA, Plaintiff gave Defendants notice in writing that  
15 Defendants were in default under Section 9.1 and 9.2 of the SA. (Plaintiff's Exhibits 4 and  
16 11.)

17           26. Although auctions were held throughout 2017 and Defendants received  
18 consignor reports after each auction indicating what had been sold and what had been  
19 paid to Plaintiff and what had been credited to the \$25,000.00 owed and the \$150,000.00  
20 owed, Defendants had never complained about the reports as being inadequate or that  
21 there were any problems with the accountings reported until the Defendants first  
22 \$12,500.00 payment was due on February 3, 2018. (T. p. 347, lines 7-16; T. p. 455, line  
23 8 through p. 456, line 4; T. p. 346, line 22 through p. 347, line 16.)

24           27. Defendants contend that Plaintiff did not auction their material in a  
25 reasonable fashion, did not conform Plaintiff's accountings and reports to Defendants'  
26 inventory that was supplied with his counsel's letter of February 9, 2018, that Plaintiff  
27 collected a "buyer's premium" in excess of the 21% provided for in the SA, that HWAC  
28 allowed employees to purchase items of Defendants at the auctions, and that Plaintiff may



1 have charged some consignors a lower rate than charged to Defendants in contravention  
2 of Section 10 of the SA. (Plaintiff's Exhibit 19.)

3 28. Section 10 of the SA requires Defendants to deliver to Plaintiff and HWAC  
4 an additional \$1.5 million of consignment material over a period of eighteen (18) months  
5 from the date of the SA. This material was to be sold by Plaintiff and HWAC in the auctions  
6 and Plaintiff was to retain certain amounts charged to buyers and sellers depending on  
7 the dollar amount or the nature of the material and the dollar amount of sales. For  
8 numismatics, HWAC's consignment fee was to be 15% or the lowest rate charged to  
9 dealer consignors in that particular auction and the buyer's premium was to be 17% to  
10 17.5%. For non-numismatic items, HWAC's consignment fee was to be 15% for items  
11 that sell for \$1,000.00 or more, 20% for items that sell for an amount between \$500.00  
12 and \$1,000.00, and 25% for items that sell for less than \$500.00. The buyer's premium  
13 for non-numismatic items, which was to be retained by HWAC, was to be 21%. As of the  
14 date of the Evidentiary Hearing, seventeen (17) months after the execution of the SA,  
15 Defendants have only delivered a small amount of consignment material pursuant to  
16 Section 10 that has a sale value of approximately \$22,000.00. (Plaintiff's Exhibit 8.)

17 29. Plaintiff conducted auctions throughout 2017 and Defendants never  
18 complained to Plaintiff, orally or in writing, about depressed prices, auction irregularities,  
19 accountings, or about any of the other complaints raised in Defendant's Declaration dated  
20 April 4, 2018 (Plaintiff's Exhibit 19) prior to the time that Defendants' first payment of  
21 \$12,500.00 was due on February 3, 2018. (T. p. 135, lines 10-24; T. p. 455, line 8 through  
22 p. 456, line 4.)

23 30. Defendant Kagin admitted that he made no such complaints. (*Id.*)

24 31. The SA requires that an inventory be provided with the material delivered,  
25 but the SA does not require that Plaintiff do anything affirmative with the inventory. The  
26 SA does not require that Plaintiff issue consignor reports that somehow tie in with  
27 Defendants' inventory. Plaintiff requested the inventory in the settlement negotiations in  
28



1 case, at some later point, there was an issue with regard to any alleged missing items. (T.  
2 p. 27, line 22 through p. 28, line 6.)

3 32. Plaintiff testified that HWAC makes its own inventory, that HWAC does not  
4 use the consignor's inventory in any instance, that no auction companies Plaintiff is aware  
5 of use a consignor's inventory for reporting purposes and that HWAC reports sales based  
6 on its own inventory created at the time the items are lotted and put in the auction. (T. p.  
7 28, line 10 through p. 29, line 6.)

8 33. Defendants' expert witness, Andrew Lustig, confirmed that most auction  
9 companies, even numismatic auction companies, do not use the consignor's inventory in  
10 placing items in an auction or in describing or reporting for the auction. (T. p. 299, line 13,  
11 through p. 300, line 12.)

12 34. Defendants' inventory is dated February 7, 2018, and the first time Plaintiff  
13 would have seen the inventory was after February 7, 2018, a little after Defendants' first  
14 \$12,500.00 installment was due. (T. p. 26, line 18 through p. 27, line 5.)

15 35. Plaintiff testified that Defendants' 125-page inventory was unusable in that it  
16 was in no order and items delivered could not be identified by the inventory. In addition  
17 to items overvalued on the inventory and items that were not purchased by HK that were  
18 delivered to Plaintiff, the inventory had hundreds of items that were inadequately  
19 described so that Plaintiff could not tell what the item was from the inventory. Defendants  
20 dumped thousands of next-to-worthless tokens on HWAC delivered in four (4) large boxes  
21 with no separate inventory, and bags of tokens and circulating Israeli coins were merely  
22 dumped into boxes with no organization whatsoever. Plaintiff testified that he went  
23 through most of the boxes and could find nothing of any real value and that it would be an  
24 economic impossibility to inventory the items individually and list them in an auction  
25 catalogue. In addition, Jim Vallier, a helper to Defendants, delivered sixty (60) boxes of  
26 material containing mostly low value items with no inventory whatsoever. Nothing in the  
27 sixty (60) boxes was inventoried by Defendants and nothing in the sixty (60) boxes is on  
28 Defendants' 125-page inventory. Defendants' 125-page inventory, along with being in no

1 discernable order, was not even paginated. (T. p. 41, line 17 through p. 89, line 11; T. p.  
2 119, lines 6-14; T. p. 158, lines 4-18.) Not even Defendant Kagin could find an item on  
3 the 125-page inventory. (T. p. 453, line 19 through p. 455, line 7.) Defendant Kagin did  
4 not ship everything on the 125-page inventory, even though he claimed to have done so.  
5 (T. p. 79, line 3 through p. 80, line 23.)

6 36. Plaintiff is an established auctioneer and HWAC is an established auction  
7 company that does live and on-line auctions that, at its last auction, had over 3,700  
8 registered bidders. (T. p. 125, line 3 through p. 126, line 7.) In addition, Plaintiff is an  
9 expert in Americana having written several books on the subject and has been preparing  
10 auction catalogues for Americana auctions since 1983. (T. p. 117, line 4 through p. 119,  
11 line 5.) Even Defendants' expert, Ronald Karp, opined that Plaintiff's catalogues were  
12 very professional and he had no problems with them. (T. p. 268, lines 8 – 15.) The items  
13 to be auctioned are described, in many cases photographed, and the auction catalogue is  
14 sent to all prior buyers and prospective buyers. (T. p. 117, line 4 through p. 119, line 5.)

15 37. Plaintiff could not auction the low-end tokens that could not economically  
16 have been individually described and photographed except in "grab bags," as was done.  
17 (T. p. 142, line 15 through p. 145, line 7.) Only a few grab bags sold, amounting to a  
18 couple of hundred dollars in auction proceeds. (*Id.*) At least 97% of the low-end tokens  
19 and shekels remain unsold and can be returned to Defendants. (T. p. 144, line 18 through  
20 p. 145, line 2.) While Defendant put on two experts on the subject of selling items in grab  
21 bags, neither expert saw the low-end items that Defendants delivered to Plaintiff. (T. p.  
22 275, line 11 through p. 276, line 4; T. p. 302, lines 14-18.)

23 38. Plaintiff's expert, Jeffrey Shevlin, testified that he looked at the low-end  
24 material that Defendants had dumped into boxes and delivered to Plaintiff and concluded  
25 that it was just a bunch of junk. (T. p. 401, line 17 through p. 403, line 3.) Plaintiff's other  
26 expert, David Bowers, testified that he looked at a picking ticket (that was admitted as  
27 Plaintiff's Exhibit 25) that included low-end tokens and phone cards and concluded that it  
28

1 was junk and that most auction companies would not agree to auction the material.  
2 (Bowers deposition p. 14, line 23 through p. 16, line 13.)

3 39. Defendant Kagin was the owner of HK prior to its break-up in 2014. (T. p.  
4 475, lines 1-4.) The auction procedures employed by Plaintiff and HWAC, as well as  
5 inventorying and cataloguing, were developed at HK and were identical to those auction  
6 procedures and consignor reports utilized by HK. (T. p. 339, lines 4-11.) Defendant Kagin  
7 could not remember what the reports looked like when he owned and ran HK, but he did  
8 testify that they were probably similar to HWAC's. (T. p. 475, lines 5-15.)

9 40. Plaintiff allowed Defendants to audit the records of HWAC as to the items  
10 delivered and sold by HWAC of all Kagin material for all auctions. (Plaintiff's Exhibit 31.)  
11 The auditor employed by Defendants had no prior experience auditing or even interacting  
12 with an auction company. (T. p. 350, lines 15-20.) Nevertheless, the auditor found no  
13 inconsistencies or inaccuracies in the consignor reports given to Defendant Kagin after  
14 every auction. (Plaintiff's Exhibit 31.) The SA does not preclude employees of HWAC  
15 from bidding on auction items of Defendants, and total employee purchases amounted to  
16 only \$225.00 for all auctions. (Plaintiff's Exhibit 13; T. p. 187, line 19 through p. 189, line  
17 19.) The auditor included as an exhibit to her report a list of employees that had purchased  
18 items at the auctions. The list that she attached included all items purchased by all  
19 employees of all material consigned by all consignors and not items purchased by  
20 employees of just material supplied by Defendants. (T. p. 353, line 15 through p. 355, line  
21 2.) The auditor was shown all consignor reports for every auction and could confirm that  
22 no consignors received a better rate than Defendants. (T. p. 355, lines 12-23.)

23 41. The buyer's premium of 21% for the Americana is collected from the buyer  
24 and has nothing to do with Defendants. Defendants are not charged the buyer's premium.  
25 (T. p. 101, lines 1-6). HWAC adds on 3% if the buyer uses a credit card or pay pal. This  
26 is a pass-through amount that goes to the bank and not to HWAC. (T. p. 100, lines 5-25).  
27 HK also added on 3% to its buyer's premium for credit card and pay pal purchases when  
28 Defendant Don Kagin owned and was the President of HK. (T. p. 100, lines 12-25; T. p.

1 476, line 20 through p.477, line 12). Defendant Kagin was aware of this because it is  
2 published in each auction catalogue was sent to Defendant Kagin before each auction.  
3 (T. p.176, line 18 through p. 178, line 18). HWAC does not charge the additional 3% if the  
4 buyer pays in cash. (T. p. 176, line 12 through p. 177, line 1). In 2018, HWAC increased  
5 its buyer's premium to 22%. The settlement, as put on the record, provides that HWAC  
6 will retain its usual buyer's premium. (Exhibit 1, p. 16, lines 11-16). Defendant Kagin  
7 could not remember whether he had agreed to that provision during the settlement  
8 negotiations. (T. p. 482, lines 6-23.)

9 42. Brook Maylath is a consultant to Plaintiff and HWAC. Ms. Maylath has a  
10 Master's in Business Administration and has been doing business development and  
11 strategic planning for the health industry in Nevada for many years. (T. p. 344, lines 10-  
12 18.)

13 43. Ms. Maylath did certain calculations to determine damages for Defendants'  
14 alleged breach of the SA. Ms. Maylath has used a similar approach or methodology in  
15 evaluating business ventures in the health care industry. (T. p. 360, line 11 through p.  
16 361, line 4). Ms. Maylath did three different scenarios: a high calculation, a medium  
17 calculation and a low calculation, showing what HWAC would make from the \$1.5 million  
18 in consigned goods, had they been delivered. In order to come up with these figures, it  
19 was necessary for Ms. Maylath to assume how much of the material supplied would be  
20 high-level Americana (which has one rate for buyer's premium and seller's fee) and what  
21 the mix would be for numismatic items (because for numismatics there are four different  
22 consignor rates depending on the value of the goods sold). These calculations are shown  
23 in Plaintiff's Exhibit 23.

24 44. In the low calculation (Exhibit 23, Table 1), Ms. Maylath weighted  
25 numismatics, which have a lower rate-of-return to HWAC than Americana, very heavily at  
26 85% and only 15% for the higher commissioned Americana. Ms. Maylath also assumed  
27 5% of non-numismatic material greater than \$1,000.00, 5% of material less than \$1,000.00  
28 but greater than \$500.00, and 5% of non-numismatic material less than \$500.00. The net

1 value to HWAC for selling the \$1.5 million under this scenario would be \$351,275.63, after  
2 deducting appropriate expenses calculated at 10%.

3 45. In the middle scenario (Plaintiff's Exhibit 23, Table 3), Ms. Maylath assumed  
4 that 25% of the consigned goods would be in each of the four different categories, i.e.,  
5 non-numismatics less than \$500.00, non-numismatics between \$500.00 and \$1,000.00,  
6 non-numismatics above \$1,000.000, and numismatics. The middle figure that HWAC  
7 would have made off the sale of the \$1.5 million is \$426,628.13 after deducting expenses.

8 46. In the high range scenario, the inputs have been changed to assume 80%  
9 of the consigned goods would be non-numismatic valued at less than \$500.00, 10%  
10 between \$500.00 and \$1,000.00, 5% greater than \$1,000.00, and 5% numismatic. The  
11 high figure comes to \$507,151.88 after deducting expenses.

12 47. The first page of Plaintiff's Exhibit 23 shows the total damages in each  
13 category after adding in \$143,309.47, the amount still owing under Section 9 after  
14 deducting the amount offset against the \$150,000.00 owing under Section 9, and lost  
15 premiums on \$25,000.00 of Americana that was never delivered. (T. p.359, line 23  
16 through p. 365, line 21). Once those amounts are added in, the three damage scenarios  
17 are: low - \$499,210.10, middle - \$574,562.60, and high - \$655,086.35. These figures do  
18 not include any offset for the payment sent by Defendant Kagin to Plaintiff prior to the  
19 evidentiary hearing in the amount of \$70,150.15.

20 48. Plaintiff was concerned because Defendant Kagin was supplying goods that  
21 he knew belonged to Dr. Awerbuch, a good client of Defendant Kagin's at HK. Plaintiff's  
22 Exhibit 16 is Dr. Awerbuch's Plea Agreement in the United States District Court, Eastern  
23 District of Michigan. Plaintiff knew that Dr. Awerbuch had been under federal indictment  
24 for several years for Medicare fraud and prescribing great quantities of opioids and that  
25 the federal government was confiscating his property. Plaintiff was concerned that, by  
26 selling material delivered by Defendants that he knew to be Dr. Awerbuch's material, he  
27 might be involved in some sort of fraud. Plaintiff made requests of Defendants to show  
28 proof of ownership or agency to sell the material, but Defendants refused. Defendant

1 Kagin thought it was none of HWAC's business who owned the material. (T. p. 161, line  
 2 7 through p. 164, line 14; T. p. 462, line 14 through p. 463, line 21.) At the evidentiary  
 3 hearing, Defendant Kagin could not produce a bill of sale for the Awerbuch material and  
 4 had conflicting statements as to whether he owned the material or Dr. Awerbuch owned  
 5 the material. (T. p. 459, line 5 through p. 463, line 21.)

## 6 **II. LEGAL ANALYSIS**

### 7 **A. Jurisdiction**

8 First, this Court has jurisdiction over the subject matter of this action as well as  
 9 personal jurisdiction over the parties to this proceeding. Under the doctrine of ancillary  
 10 jurisdiction, a federal court maintains jurisdiction "over some matters (otherwise beyond  
 11 their competence) that are incidental to other matters properly before them." *K.C. ex. Rel.*  
 12 *Erica C. v. Torlakson*, 762 F.3d 963, 966 (9th Cir. 2014) (quoting *Kokkonen v. Guardian*  
 13 *Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994)). One of these purposes is "to enable a  
 14 court to function successfully, that is, to manage its proceedings, vindicate its authority,  
 15 and effectuate its decrees." *Id.* In the case of settlement agreements, the court retains  
 16 ancillary jurisdiction over the enforcement of such agreements if the order of dismissal  
 17 contains a provision indicating that the court will "retain jurisdiction" over the agreement.  
 18 *K.C.*, 762 F.3d at 967. That is exactly the case here. In the order of dismissal, the court  
 19 expressly stated that "the settlement among the parties is a reasonable compromise and  
 20 that the United States District Court for the District of Nevada shall retain jurisdiction over  
 21 the parties to enforce the terms of the Settlement Agreement." (ECF No. 186). Therefore,  
 22 this Court has ancillary jurisdiction to enforce the settlement agreement in this case.

### 23 **B. Enforcement of Settlement Agreements**

24 Settlement agreements are governed by the law of the forum state. *United*  
 25 *Commercial Ins. Serv. Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992). Under  
 26 Nevada law, a settlement agreement is a contract and general contract principles govern  
 27 the interpretation and enforcement of such agreements. *May v. Anderson*, 121 Nev. 668,  
 28 672, 119 P.3d 1254, 1257 (2005). A contract is valid and enforceable under Nevada law

1 if there has been “an offer and acceptance, meeting of the minds and consideration.” *Id.*  
2 In this case, there is no dispute between the parties over whether the settlement  
3 agreement is a valid and enforceable contract. Rather, the dispute in this case centers  
4 upon whether Defendants breached the agreement, and if so, what remedy should be  
5 imposed.

6 Under Nevada law, breach of contract is a material failure of performance of a duty  
7 arising under or imposed by an agreement. A breach of contract claim requires: (1) the  
8 existence of a valid contract; (2) a breach by the defendant; and (3) damage as a result of  
9 the breach. *Contreras v. American Family Mutual Insurance Company*, 135 F.Supp.3d  
10 1208, 1224 (D. Nev. 2015). Total breach of a contract is a breach that so substantially  
11 impairs the value of the contract at the time of the breach that the circumstances allow the  
12 non-breaching party to recover damages based on all of their remaining rights to  
13 performance. *Mobil Oil Exploration and Producing Southeast, Inc. v. U.S.*, 530 U.S. 604,  
14 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000); *Restatement (Second) of Contracts*, Section 243.

15 Here, the Court finds that Defendants materially breached the settlement agreement.  
16 First, the SA provides, in Section 9.1, that Defendants will pay Plaintiff the sum of  
17 \$150,000.00 in twelve equal monthly installments of \$12,500.00 each, beginning one year  
18 from the date of the agreement, which payments are subject to credits as set forth in  
19 Section 9.2. However, Defendants defaulted under the terms of the SA when they failed  
20 to make the first \$12,500.00 payment due on February 3, 2018, pursuant to Section 9.1.  
21 Plaintiff properly put Defendants on notice of the default on February 6, 2018, and  
22 February 13, 2018. Defendants continued to default with their failure to make each and  
23 every monthly payment of \$12,500.00 thereafter through June of 2018. The defaults were  
24 material defaults. Defendants’ delivery of a check in the amount of \$70,150.15 the Friday  
25 evening prior to the evidentiary hearing conducted on July 11 and 12, 2018, does not undo  
26 or nullify these prior defaults. The Court specifically rejects Defendants’ contentions that  
27 the Court should order that Plaintiff accept the check in the amount of \$70,150.15 and that  
28 the parties be ordered to continue their relationship.



1 In addition, Defendants failed to supply Plaintiff with \$200,000.00 worth of  
2 Americana based on prices paid by Plaintiff when he was an employee of HK pursuant to  
3 Section 9.2 of the agreement, which also constituted a breach. Section 9.2 of the SA  
4 provided that Defendant would provide Plaintiff with \$200,000.00 in Americana items  
5 owned by HK, along with an inventory. Upon receipt of the Americana, HWAC (Plaintiff)  
6 would, in turn, auction in a reasonable manner. Per the terms of the SA, Plaintiff would  
7 retain from the auction proceeds a buyer's premium of 21% and 7.5% of the hammer price  
8 of each item. The remaining auction proceeds were to be applied in the following order:  
9 first to pay Plaintiff \$25,000.00 and second to pay Plaintiff the \$150,000.00 obligation set  
10 forth in Section 9.1, and to offset Defendants' obligation to pay the \$150,000.00 in  
11 installment payments of \$12,500.00 commencing one year from the date of the SA. Later  
12 in Section 9.2, it provides that Plaintiff was to provide a report of "material sold, the venue  
13 and manner of sale, the prices realized, the proceeds paid to Mr. Holabird, and the  
14 proceeds credited against the \$150,000.00" identified in Section 9.1.

15 The evidence shows that Defendants included items that were not previously  
16 owned by HK, items that were owned by third-parties, items that were overpriced by  
17 Defendants and that, all totaled, Defendants only supplied approximately \$43,000.00  
18 worth of Americana that had previously been owned by HK and purchased by Plaintiff or  
19 had been sold to HK by Plaintiff when Defendant Kagin acquired Plaintiff's business in  
20 2008. Failure to deliver the \$200,000.00 in prior-owned HK Americana was a separate  
21 breach of the SA. Although the SA does not provide when the Americana was to be  
22 delivered, a normal interpretation is that it would be delivered within a reasonable time  
23 after execution of the SA. Plaintiff testified that his understanding was that it would be  
24 delivered in one shipment shortly after execution. Defendants did not testify as to their  
25 understanding. The fact that the entire \$200,000.00 still has not been delivered some  
26 seventeen (17) months after execution of the SA is unreasonable and is a material breach  
27 of the contract.  
28

1 None of Defendants' explanations for not complying with the contract are  
2 reasonable or believable. All of Defendants claims in defense are either such small sums  
3 as to not be material (such as Plaintiff adding on a 3% pass-through charge for credit cards  
4 on the buyer's premium, or that certain employees purchased items out of the auctions  
5 belonging to Defendants, or that Plaintiff sold a few hundred dollars of low end material in  
6 "grab bags") or were unsupported by any credible evidence.

7 Defendants were unable to show that Plaintiff had conducted the auctions in an  
8 unreasonable manner or that the manner of conducting the auctions depressed prices of  
9 Defendants' materials. On the contrary, the credible evidence showed that Plaintiff was a  
10 leading auctioneer and auction company that conducted auctions in a meticulous manner,  
11 just as they had always been conducted, even when Plaintiff was an employee of HK, a  
12 company owed and managed by Defendant Kagin. The evidence showed Defendants  
13 never complained about accountings, reports, auction procedures, methods of conducting  
14 the auctions, employees purchasing items in the auctions, the amount of the buyer's  
15 premium or anything else until one year after the SA had been signed, several auctions  
16 had been conducted and reported on, and Defendants' first payment of \$12,500.00 was  
17 due, which further strains credulity. In sum, Defendants materially breached the settlement  
18 agreement.

19 Pursuant to the election of remedies doctrine, in the case of a continuing contract,  
20 upon learning of a breach, a party must choose between terminating the contract and  
21 suing for damages or continuing the contract and suing for damages. Said another way,  
22 when a party materially breaches a contract, the non-breaching party may choose to  
23 continue to perform the contract or may refuse to continue and terminate the agreement.  
24 *Starlite Aviation Operations, Ltd. v. Erickson, Inc.*, 2015 WL 2367998 (D. Oregon 2015);  
25 *Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 103 F.Supp.2d 711, 736  
26 (S.D.N.Y. 2000). In this case, Plaintiff has elected to terminate the contract and sought  
27 damages by way of an evidentiary hearing and to reduce those damages to a judgment.  
28

Damages for a breach of contract should be awarded in an amount that will make the aggrieved party whole and to place them in the position they would have been in had the contract not been breached. *Rd. & Highway Builders v. N. Nev. Rebar*, 284 P.3d 377, 382 (Nev. 2012). There must be sufficient evidence provided to allow the court to reasonably calculate an accurate amount of damages. *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 248 (Nev. 2008). Here, Plaintiff presented sufficient evidence to provide a reasonable approach to calculate the damages for Defendants' breach of the SA. Plaintiff presented three (3) different scenarios for damages: a low range, a middle range and a high range. Plaintiff's assumptions were reasonable and damages are not speculative. The Court selects the low range, in the total amount of \$499,210.10, as the appropriate calculation of damages.<sup>3</sup>

### III. CONCLUSION

For good cause appearing and for the reasons stated above, the court recommends that Plaintiff's Motion for Evidentiary Hearing to Enforce Settlement Agreement be granted, (ECF No. 197), and Defendants' Cross-Motion to Enforcement Settlement Agreement be denied (ECF No. 208).

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Local Rule IB 3-2, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

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<sup>3</sup> This amount does not include an offset for the \$70,150.15 payment sent by Defendant Kagin on the eve of the evidentiary hearing nor does it include any offsets for any subsequent payments sent following the evidentiary hearing. Plaintiff may choose whether to retain those payments and apply them toward the outstanding judgment or to return the payments to Defendants. Plaintiff shall, however, return to Defendants any goods or items received prior to or after the evidentiary hearing that have been held by Plaintiff pending the Court's resolution in this case.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

**IV. RECOMMENDATION**

**IT IS THEREFORE RECOMMENDED** that Plaintiff's Motion for Evidentiary Hearing to Enforce Settlement Agreement (ECF No. 197) be **GRANTED**, and Defendant's Cross-Motion to Enforcement Settlement Agreement (ECF No. 208) be **DENIED**;

**IT IS FURTHER RECOMMENDED** that the court enter judgment in this case in favor of Plaintiffs and against Defendants, jointly and severally, in the total sum amount of **\$499,210.10**.

**DATED:** December 18, 2018.

  
UNITED STATES MAGISTRATE JUDGE